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Supreme Court of the United States

No. 417. October Term, 1942.

WILLIAM W. BACHMANN,
Petitioner,

against

NEW YORK CITY TUNNEL AUTHORITY.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

September 25, 1942.

WILLIAM C. CHANLER,
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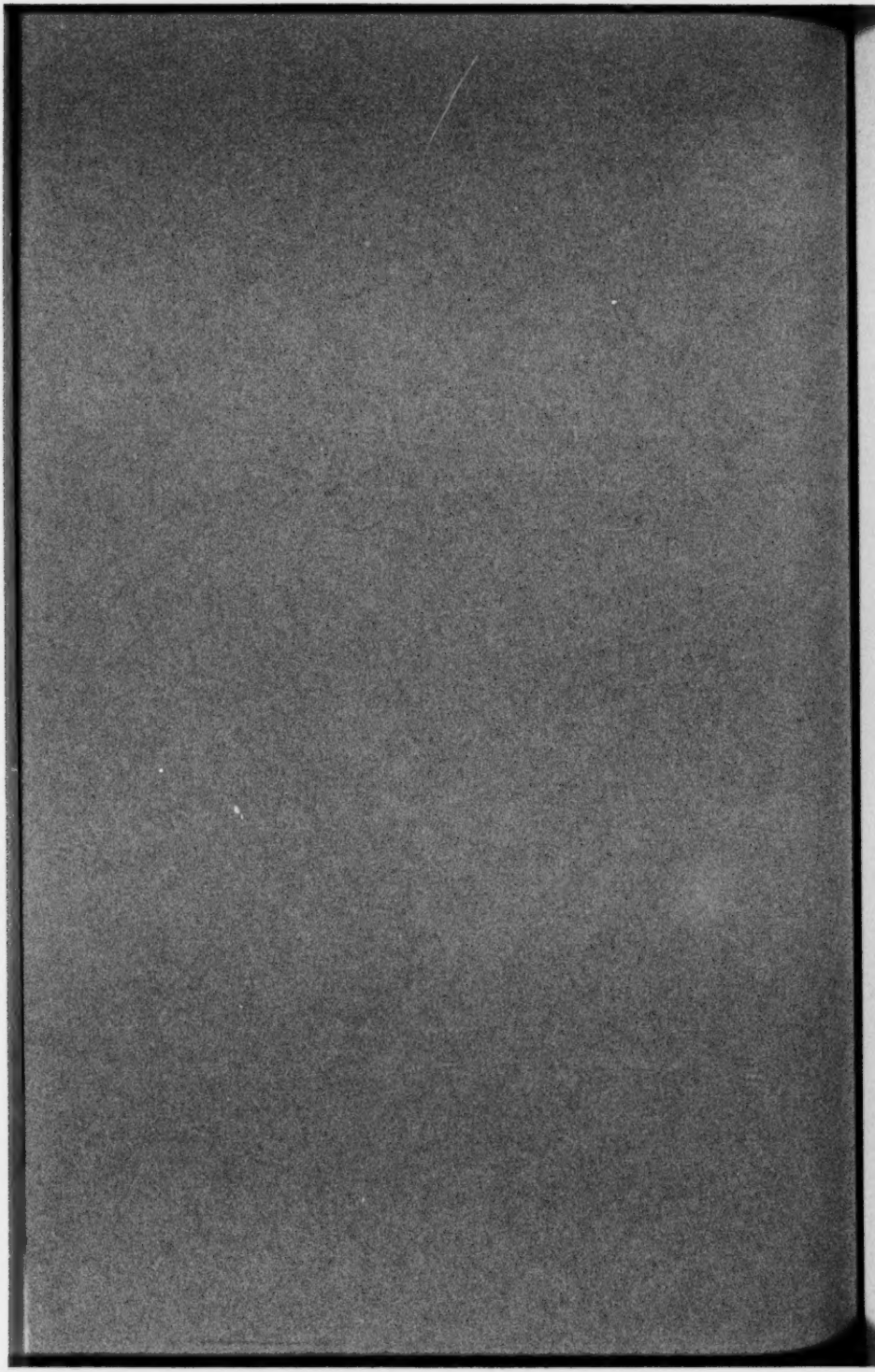
New York, N. Y.



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The petition for certiorari should be denied because the complaint (R. 8-13), fails to assert a violation of the plaintiff's rights under the United States Constitution.

The petition should be denied for the further reason that while the plaintiff in his complaint seeks damages for change of grade, it is well-established that such a right is not one guaranteed by the United States Constitution. *Smith* v. *Corporation of Washington, D. C.,* 20 How. 135, 148 (1858). And see *Mead* v. *Portland,* 200 U. S. 148, 163-164 (1906); *Sauer* v. *City of New York,* 206 U. S. 536 (1906); *Crane* v. *Hahlo,* 258 U. S. 142 (1922). It is therefore a right which the State may give or withhold in its discretion.

It is true that the last two cases cited concerned a viaduct built down the middle of a street, rather than a change of grade of the roadway itself. But this Court put the two occurrences on a parity, saying in the *Sauer* case (p. 544):

> "The state courts have uniformly held that the erection over a street of an elevated viaduct, intended for

> general public travel and not devoted to the exclusive use of a private transportation corporation, is a legitimate street improvement equivalent to a change of grade; and that, as in the case of a change of grade, an owner of land abutting on the street is not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it."

See also *Osborne* v. *District of Columbia,* 63 App. D. C. 277, 72 Fed. (2d) 70 (1934), where the defendant was held not liable for damages alleged to have been suffered by a change of grade of the character presented in the case at bar.

Cases like *Muhlker* v. *New York & Harlem R. Co.,* 197 U. S. 544 (1905), are distinguishable because they involved a change in state law under circumstances amounting to the impairment of the obligation of a contract. In the instant case, state policy has undergone no change but has been consistent in its denial of relief under the circumstances presented here. Moreover, the plaintiff's invocation of the contracts clause proceeds from a bizarre misreading of the decisions of this Court, and flies in the face of *Garrison* v. *City of New York,* 21 Wall. 196, 203-204 (1874).

No decisions in this Court have been cited by the petitioner, nor discovered by our own researches, which hold that, *in a field where compensation is a statutory and not a constitutional right,* the State cannot impose liability on cities while refraining from imposing liability either on itself, or on public "authorities," which are not political subdivisions *strictiore sensu* but are bodies charged with responsibility for carrying out and maintaining particular public improvements. That is all that has occurred here. Had the Mid-Town Tunnel been a strictly municipal project,

carried out by the City of New York, liability to one situated as was the petitioner would have been imposed by N. Y. L. 1937, ch. 929, § 307a-3.0(b) (Administrative Code of the City of New York, p. 127). But it is otherwise where the entrepreneur is one of the "authorities" organized by the State of New York under the Public Authorities Law (N. Y. Laws 1939, ch. 870).

We call the Court's attention to the fact that in the instant case, the Court of last resort of New York did not entertain the plaintiff's appeal, but dismissed it "on the ground no substantial constitutional question is involved". 288 N. Y. 707, 708 (Advance Sheets of July 25, 1942, temporary pagination 231).

The petition for certiorari should be denied.

September 25, 1942.

Respectfully submitted,

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